No. 2864

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NG CHOY FONG,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Attorney for Plaintiff in Error.

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Upon the oral argument some questions of the members of the Honorable Court and some arguments of the Assistant District Attorney, indicated that the position of plaintiff in error had not been made clear in her brief heretofore served and filed.

Plaintiff in error does not contend that the requirement that no person shall be deprived of liberty without due process of law prevents Congress absolutely from requiring in criminal cases presumptions to be raised on the establishment of certain facts. We admit that Congress may provide, even in criminal cases, that when certain facts have been proved they shall be *prima facie* evidence of other facts, when the former facts have some fair relation to and natural connection

with the fact presumed. But we emphatically deny that Congress has any power whatsoever to require, from facts which are consistent with the innocence of the accused and not any necessary constituent of the crime charged, the presumption that an accused is guilty unless he satisfies the jury to the contrary. And it is submitted that this view of the law is borne out, not only by the authorities cited by plaintiff in error, but also by the very authorities cited by the government itself. In People v. Cannon, 139 N. Y. 32, 34 N. E. 759 (cited and relied on by the government on page 6 of its brief), the view of plaintiff in error is indicated on page 762 of the Northeastern Report as follows:

> "It cannot be disputed that the courts of this and other states are committed to the general principle that, even in criminal prosecutions, the legislature may, *with some limitations,* enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary; and the accused must have, in each case, a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence, and given such weight to the presumption as to it shall seem proper."

Even this authority, upon which the government so strongly relies, clearly indicates that there are

limitations upon the power of Congress in its control over the rules of evidence and procedure. Congress cannot arbitrarily require presumptions of guilt to be raised from facts which are consistent with the innocence of accused, and which are not a necessary constituent of the crime charged. The presumptions which Congress can require are those which have some fair relation to or necessary connection with the crime charged.

The government has suggested two presumptions of the kind within the power of Congress to enact. These presumptions were recognized by the rules of common law governing criminal procedure at the time the Constitution and the first ten amendments thereto were adopted. The facts from which the presumption in each case is made have a fair relation to the fact presumed and have a necessary connection with the crime charged.

In the one case it was presumed from the possession of stolen goods that the possessor knew that the goods were stolen. In the other case it was presumed from the possession of the effects of a murdered person that the person committed the murder. *But it must be noted that the prosecution has to prove that the goods found in the possession of the accused were actually stolen goods or had actually belonged to the murdered person before the presumption is raised.*

These cases it is submitted, are not analogous to the case at bar and cannot support the presumption sought to be made by the act of February

9th, 1909. If that act required the prosecution to establish the fact that the smoking opium found in the possession of the accused was actually imported after April 1st, 1909, then it would have to be admitted that the analogy of the common laws presumptions, raised from the possession of stolen goods or effetes of a murdered person, would justify Congress in requiring a presumption that the possessor knew the opium was imported after April 1st, 1909. But the act doesn't require the prosecution to establish any such thing. It attempts to make the possession of any smoking opium, whenever imported, *prima facie* evidence of guilt. It goes far beyond the common law presumptions referred to and attempts to make possession of opium presumptive that the opium was imported after April 1st, 1909, and that the possessor knew that fact. Possession of smoking opium is perfectly consistent with the fact that the opium was imported before April 1st, 1909, or with the fact that it was produced here. Nor is a necessary constituent of the crime charged. If the opium was imported before April 1st, 1909, or if it was produced here, then the possession of it is not a crime. The crux of the very matter is whether or not the opium was imported after April 1st, 1909. Whether or not a crime was committed depends on that fact, and it is beyond the power of Congress to predetermine that fact and take from the accused the right to have that fact determined by a court and jury after a trial conducted according to the

fundamental methods existing at common law at the adoption of our Constitution.

Consider the common law presumptions referred to in a form analogous to that attempted to be required by the act of February 9th, 1909. Instead of raising the presumption that the possessor of goods actually proved to have been stolen, knew the goods to have been stolen, suppose Congress attempted to require that goods of a similar character to those stolen would be presumed to have been stolen and that the possessor was guilty unless he proved the contrary to the satisfaction of the jury. In other words, if a fifty dollar bill or a sack of wheat were stolen it would be presumed that any fifty dollar bill or sack of wheat was the stolen bill or sack, as the case might be, and the possessor was guilty. It would be absurd to contend that Congress has any such power. The courts would immediately brand such an act unconstitutional as depriving an accused of liberty without due process of law.

Yet in the case at bar Congress is attempting to raise a presumption exactly analogous to the one suggested. In the one case it attempts to presume that any fifty dollar bill or any sack of wheat was the one stolen. In the other case it attempts to presume that any smoking opium was imported after April 1st. And in both cases, that the possessor of such bill or sack or opium was guilty. Clearly possession of a fifty dollar bill or a sack of wheat or a can of smoking opium is

perfectly consistent with the fact that the bill or the sack was not stolen or that the can of opium was not imported after April 1st, 1909.

So too the possession of a fifty dollar bill or of a sack of wheat is not a necessary constituent of the crime of having possession of a stolen bill or sack. It is not a constituent of the crime unless that particular bill or that particular sack possessed by the accused is the bill or sack stolen. Likewise the possession of a can of opium is not a constituent part of the crime of having knowingly concealed a can of smoking opium imported after April 1st, 1909, unless that particular can was imported after that date.

In both cases the fact sought to be presumed—that is the guilt of the accused—has no fair relation or necessary connection with the facts from which the presumption is sought to be made. Such a presumption is arbitrary and unreasonable. The possession of a fifty dollar bill or a sack of wheat cannot reasonably be said to have any fair relation to or necessary connection with the crime of knowingly possessing or concealing a stolen fifty dollar bill or sack of wheat. The whole thing depends on whether the particular bill or sack was the one stolen. So too the possession of a can of smoking opium has no fair relation or necessary connection with the crime of having knowingly concealed a can of smoking opium imported after April 1st, 1909. The whole thing depends on whether it was or was not so imported. And in neither case

can Congress authorize, from the possession of the bill or sack or can, the presumption of guilt.

It is submitted that an examination of the cases cited by the government will not develop anything contrary to that herein expressed.

In State v. Beswick, 13 Rhode Island 211, cited and discussed by plaintiff in error on pages 21 to 22 of her brief, the court held unconstitutional a provision of a law prohibiting the sale of liquor, to the effect that it was not necessary to prove an actual sale of liquor in any particular premises in order to establish that liquors were kept there for sale, but that the notorious character of any such premises or the notoriously bad or intemperate character of persons frequenting the same or the keeping of implements or appurtenances usually appertaining to grog-shops or places where liquors are sold, shall be *prima facie* evidence that liquors are kept on such premises for the purpose of sale within the State.

The government, on page 21 of its brief, cites the case as supporting a provision of the law providing for a presumption similar to the one in the Act of February 9th, 1909. An examination of the cases discloses no such provision.

It appears that the act in question prohibited the sale or keeping for sale of intoxicating liquors, except for medicinal and sacramental purposes. And the sale for these purposes was licensed as in the act provided. The act also provided that

"no negative allegations of any kind need be averred or proved" in any criminal proceedings for the enforcement of the act. The defendant contended this provision unconstitutional as a deprivation of liberty without due process of law. The court rejected the contention and held the provision valid. It pointed out the familiar principle of criminal pleading that if the prohibitory clause of the statute, prohibiting the sale or keeping for sale of liquors, had not incorporated by reference the exceptions, permitting the sale for medicinal and sacramental purposes when licensed, that no negative averments would be required by the rules of criminal pleading. (See 22 Cyc., 344 seq., especially notes 46 and 47, on page 346.) It then concluded that, since the reference could be stricken out by amendment and the burden of affirmatively proving the license and exception would be placed on the defendant, the legislature could accomplish the same result by direct enactment. The court said in part at page 215:

> *"No negative averments would be required by the rules of criminal pleading if the exceptions to the prohibition were not incorporated by reference in the prohibitory clause. But for the reference the burden would fall on the accused, if he were within an exception, to show it by way of defence. So too the burden would be cast upon him if the reference were stricken out by amendment, and certainly if the legislature can throw this burden on the accused by such an amendment, it cannot be unconstitutional for it to accomplish the same result by direct and original enactment.* The

> only effect of the enactment is to require that if any of the few persons who are privileged to sell intoxicating liquors are prosecuted for selling or keeping for sale, they shall show that they are privileged in defence, instead of requiring the prosecution to show in every case that the accused is not privileged. We can but think that the requirement is as constitutional as it is reasonable."

The decision of the Rhode Island court on this point cannot support the contention of the government that the Congress has power to require any sort or kind of fact to be presumed upon the establishment of some other fact. It does not at all deal with such a proposition. It deals merely with matters of criminal pleading.

Nor does the case of State v. Patrick Higgins, in the same volume (13 Rhode Island, 330), cited by the government on page 5 of its brief, give any greater support to the government. In that case the Rhode Island court, speaking through the same judge who decided the Beswick case, was dealing with the same act as construed in the Beswick case. The only difference was that in this case it appeared that the legislature had repealed the provision that "no negative allegations of any kind need be averred or proved" and had substituted a provision that "evidence of the sale or keeping of intoxicating liquors for sale shall be *prima facie* evidence that the sale or keeping is illegal". The court held that in effect this provision was the same as that repealed and was, therefore, constitutional, saying in part at page 331:

> "The question thus presented is in our opinion essentially the same as one of the questions decided in *State v. Beswick, ante,* p. 211. The court decided in that case that the General Assembly has the constitutional power to relieve the State, by direct enactment, in liquor prosecutions, from the necessity of either alleging or proving that the accused has no license, leaving it for him to show his license, if he has it, by way of defence. The enactment here, though superficially different, is identical in effect with the enactment there sustained. If then the decision there was right, the enactment here ought to be sustained. We see no reason to doubt the correctness of the decision. *It is entirely reasonable, we think, that a person who is prosecuted for an act, which is generally criminal, should, if licensed to commit it, be required to show his license in defence whenever there is evidence to establish his guilt if he has no license.* To require this is not to violate any fundamental rule or principle established by the common law for the protection of the subject or the citizen; but, on the contrary, it is according to the usual course of procedure, and has never been supposed to be inconsistent either with the maxim that every person is to be presumed innocent until he is proved guilty, or with the great provision of *Magna Charta,* that 'no man shall be deprived of life, liberty, or property unless by the judgment of his peers or the law of the land.' "

This decision cannot support the contention of the government that Congress has power to require the guilt of an accused to be presumed from facts which are consistent with the innocence of the accused and which are no necessary constituent of the crime charged. In fact the Rhode Island

court expressly points out that no such a decision is made saying in part at 332:

> *"The enactment which was condemned in State v. Beswick was something radically different, and something too which, in so extreme a form, was utterly without precedent. It was an enactment which related, not to the proof or the disproof of any special privilege or exemption, but to the proof of the offence itself, and obliged the jury to presume its commission from circumstances which were not only consistent with the innocence of the accused, but would not be any necessary constituent of the offence if committed."*

In State v. Mellor, in the volume (13 Rhode Island, 666), cited by the government on page 5 of its brief, it appeared that the legislature had amended the provision construed in the Higgins case by striking out the words *"prima facie"* so that the provision was that "evidence of the sale or keeping of intoxicating liquors for sale shall be evidence that the sale is illegal". On the basis of the Higgins case the court held the provision constitutional, saying in part at page 669:

> *"The striking out of the words prima facie has no other effect than to leave the jury free to decide for or against the State, according as they consider the evidence convincing or not."*

All these cases stand for is that the legislative body may validly require one, who is licensed to do that which but for the license would be criminal, to affirmatively plead and prove the license. But this is not the proposition presented by the Act

of February 9th, 1909. The possession of smoking opium is not criminal unless it was imported after April 1st, 1909. Congress does not purport to forbid the possession of all opium except when licensed. In fact Congress has no power to make any such law. Its power to penalize the possession of smoking opium imported after April 1st, 1909, is derived from its power to regulate commerce.

Brolan v. United States, 236 U. S. 216; 35 Sup. Ct. Rep. 285.

And that power does not extend to enable Congress to penalize the possession of opium imported prior to the time Congress prohibited the importation of opium.

People v. Cannon, 139 N. Y. 32; 34 N. E. 759, cited by the government on page 6 of its brief, is analogous to the Rhode Island cases. The law in question, prohibited junk dealers and dealers in second-hand goods to sell, buy, give, take or dispose of, or traffic in, stamped bottles, without the written consent of the person whose stamp was on the bottle. The law provided further that possession of such bottles by a junk man or second-hand dealer should be presumptive of guilt. In other words, the law required one who committed the act prohibited by the law, unless licensed, to prove the license or written consent. The court held the provisions constitutional. There is nothing different in this case from the Rhode Island case, and, indeed, the court recognizes limitations on the power of legislative bodies to require presumptions

of guilt on the establishment of certain facts. This is shown by the quotation from the opinion given on page 2 of this brief.

Neither the case of Howard v. Moot, 64 N. Y. 261, cited by the government on page 6 of its brief, nor the quotation from the case given on that page, deal with the question at bar. That case was a civil case and not a criminal one. No question of the power of a legislative body to subvert the presumption of innocence was presented. The case merely dealt with the existence of the power of a legislative body to modify and control rules of evidence and procedure. In the matter at bar, we are not concerned with the existence of the power, but with the limitations upon it in criminal cases.

Dated, San Francisco,
March 21, 1917.

Respectfully submitted,

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